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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

REPLY COMMENTS OF GTE

GTE Service Corporation and its below-listed affiliates[1] (collectively, "GTE") respectfully submit their Reply Comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[2] In the NPRM, the Commission sought comment on its tentative proposal to have the states handle the issue of reciprocal compensation for ISP-bound traffic through the arbitration procedures set forth in

[1] GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc., GTE Communications Corporation, GTE Wireless Incorporated, GTE Internetworking, and GTE Media Ventures Incorporated.

[2] *Implementation of Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98 and 99-68 (Feb. 26, 1999) ("*Ruling and NPRM*").

Sections 251 and 252 of the Communications Act. The Commission also invited parties to submit alternative proposals, and invited comment on a narrow issue relating to Section 252(i).

As set forth below, a wide range of parties agreed that the Commission can not lawfully delegate the matter of inter-carrier compensation for interstate traffic to the states. Moreover, many parties joined with GTE in urging the Commission not to establish a new federal inter-carrier compensation mechanism that separates ISP-bound traffic from other forms of interstate traffic and "treats it as local." Instead, GTE urged the Commission to develop a long range plan that treats ISP-bound traffic in a manner consistent with other interstate traffic and, in the mean time, to establish an 18-month moratorium on inter-carrier compensation for ISP-bound calls.

I. THE COMMENTS CONTAINED SUBSTANTIAL SUPPORT FOR THE PRINCIPLES AND REASONING UNDERLYING GTE'S PROPOSAL

The comments are resoundingly clear that the Commission should maintain its hands-off approach to the Internet, while pursuing policies and rules in the network access markets that allow for its continued growth and development. For example, there was widespread agreement among commenters that the "ESP exemption"[3] has played a valuable role in the incredible growth of the Internet medium, and that the Commission should not disturb the exemption at this time. Ultimately, GTE, joined by

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[3] This exemption allows information service providers, including ISPs, to obtain interstate access without paying access charges. *See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1981); *see also Ruling and NPRM* ¶ 5.

other incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs), interexchange carriers (IXCs), Internet service providers (ISPs) and others, has urged the Commission to foster a competitive, deregulated market for Internet access that allows consumers a wide range of affordable service options.

A well-thought-out mechanism for inter-carrier compensation that fairly accounts for carriers' costs is an important regulatory component of an efficient and competitive network access market. Unfortunately, the current approach, under which "reciprocal compensation" obligations may be imposed on ISP-bound calls, distorts the access market and creates a mismatch between revenues and costs. A number of commenters joined GTE in recognizing the market-distorting flaws of the current regime. For example, Bell Atlantic recognized that these lop-sided reciprocal compensation payments have created incredible arbitrage opportunities for CLECs – encouraging uneconomic entry, poor investment decisions and biased access technology choices.[4] Similarly, treating interstate ISP-bound calls "as though they were local" for reciprocal compensation purposes creates a fundamental mismatch in ILECs' revenues and costs associated with such traffic.[5] Indeed, there is no interstate revenue to be shared between carriers. Accordingly, as Ameritech demonstrated, per-minute

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[4] *See* Bell Atlantic Comments at 3 n.2 (noting that Global NAPs, Inc. "reported that 99% of its revenues during the first quarter of 1998 [ ] were derived from reciprocal compensation payments"); *see also* GTE Comments at 8-11; Ameritech Comments at 10-12; SBC Comments at 18-22.

[5] *See* GTE Comments at 6-8; Ameritech Comments at 8-10; SBC Comments at 7-9; Bell Atlantic Comments at 2-3; and BellSouth Comments at 7-9.

reciprocal compensation charges generated by a heavy Internet user can easily dwarf the flat local service fee such a customer pays the ILEC.[6]

In light of these shortcomings, the Commission should promptly act in this proceeding to develop a simple, flexible approach to inter-carrier compensation that ensures the proliferation of multiple service options and allows all carriers to recoup their costs.[7] As a first step, GTE urged the Commission to establish an 18-month moratorium during which no inter-carrier compensation would apply to ISP-bound calls. This immediate action would eliminate payments between LECs, but would not disturb the ESP exemption or prohibit CLECs from recovering costs from ISPs. Next, the Commission should develop a permanent mechanism for inter-carrier compensation that treats ISP-bound traffic in a manner consistent with other interstate services.

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6 *See* Ameritech Comments, Attachment A.

7 Prompt action is particularly necessary in light of the fact that states recently have reached contradictory conclusions with respect to how to handle ISP-bound traffic. One state, for example, has continued to require the payment of reciprocal compensation for ISP-bound traffic. *See Petition by Pacific Bell For Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc.*, Application 98-11-024, Final Arbitrator's Report at 19-27 (released Apr. 23, 1999). Other states, however, have concluded that this is not a matter within their authority, based on the FCC's finding that ISP-bound traffic is an interstate service. *See, e.g.,* Vermont Public Service Board ("Vermont PSB") Comments at 6; *see also In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration*, Case No. TO-98-278 (Missouri Pub. Serv. Comm'n, April 16, 1999) ("*Missouri PSC Ruling*"). The Missouri PSC concluded that "the FCC should exercise its primary jurisdiction to decide the appropriate amount of reciprocal compensation, if any, that should be paid for ISP-bound traffic. Until the FCC makes that decision, the [Missouri PSC] will not attempt to determine the amount of compensation that should be paid." *Id.* Accordingly, the Missouri PSC instructed that two LECs would "not be required to pay reciprocal compensation for ISP-bound traffic" until the FCC reaches a decision in this matter. *Id.*

These steps should go far towards creating an economically rational reciprocal compensation system.

II. THE COMMISSION MAY NOT DELEGATE THIS INTERSTATE MATTER TO THE STATES

A. The Commission's Conclusion That States May Extend Reciprocal Compensation Obligations to Cover ISP-Bound Traffic is Inconsistent With the Communications Act

The Commission may not simply delegate this interstate matter to state commissions. The FCC has confirmed, in the *Ruling and NPRM*, that ISP-bound traffic is "non-local interstate traffic,"[8] and thus not subject to the reciprocal compensation obligation of Section 251(b)(5).[9] Incongruously, the FCC went on to suggest that states nonetheless should regulate inter-carrier compensation for ISP-bound traffic pursuant to the local interconnection provisions of the 1996 Act.[10] GTE and many other commenters recognized that there is simply no basis for this second conclusion, and that states lack regulatory authority in this area because ISP-bound traffic has been found to be jurisdictionally interstate.

Numerous commenters, including companies providing competitive Internet access services and long distance service, agreed with GTE's conclusion that nothing in the Act confers authority on the states to arbitrate reciprocal compensation issues

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8 *Ruling and NPRM* ¶ 26, n.87; *see also id.* ¶ 18.

9 *See id.* ¶ 18.

10 *Ruling and NPRM* ¶ 30.

relating to interstate traffic.[11] Moreover, there was substantial agreement among commenters that, to the extent that state authority is not expressly provided in the Act, there is no basis for the FCC to delegate authority over interstate services to the states.[12] Sprint, for example, noted that "there is nothing in the Communications Act that vests this Commission with the authority to grant jurisdiction over interstate communications to the states."[13] The Vermont Public Service Board similarly suggested that the FCC's proposal to delegate interstate regulatory authority to the states represents an "unprecedented step."[14] GTE shares these concerns and urges the Commission to follow the law and not to leave this issue to the states.

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[11] *See* GTE Comments at 12-14; *see, also* Ameritech Comments at 18-20; Bell Atlantic Comments at 5; Bell South Comments at 5; SBC Comments at 5-7; U S WEST Comments at 12-14; Frontier Communications Comments at 6-7; ICG Comments at 3-4; National Telephone Cooperative Association ("NTCA") Comments at 8-9; Sprint Comments at 7; United States Telephone Association ("USTA") Comments at 4; Vermont PSB Comments at 6.

[12] *See* Ameritech Comments at 15-17; Bell Atlantic Comments at 5; Bell South Comments at 5; SBC Comments at 5-7; U S WEST Comments at 12-14; Sprint Comments at 3, 7; Vermont PSB Comments at 6. *See also* Cox Enterprises Comments at 7, n.12 ("[i]t is not so certain . . . that the Commission has the power to give the States the authority to separately determine an interstate rate, as the *Notice* proposes").

[13] Sprint Comments at 7. Sprint further explained that it "has serious misgivings about the Commission's authority to apply §§ 251 and 252 to [ISP-bound traffic], separate and apart from other purely local traffic." *Id.* at 6. With this limitation in mind, Sprint recognized that the *only way* the Commission could leave this issue to the states under Sections 251 and 252 would be to treat ISP-bound calls "as though they were local calls" subject to Section 251(b)(5). *See id.* at 6-7. This statement is inconsistent with Sprint's legal position noted above. Also, this pathway has been foreclosed by the Commission: it has ruled that "the reciprocal compensation requirements of Section 251(b)(5) of the Act . . . do[es] not govern inter-carrier compensation for [ISP-bound traffic]." *Ruling and NPRM* ¶ 26 n.87.

[14] Vermont PSB Comments at 6. "Rather than exercising its authority derived from

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B. Commenters Offered Nothing To Support The Commission's Conclusion That This Issue May Be Resolved By The States Under Sections 251 and 252

While many commenters expressed rhetorical support for state negotiation and arbitration of these issues, they offered no valid legal explanation of how such an approach would be permissible. Indeed, most commenters supporting the Commission's tentative plan to leave this issue for resolution under the Section 251/252 mechanisms offer no analysis of this elementary jurisdictional issue.[15]

For example, CTSI correctly recognized that "Section 252(a) does not limit the matters that parties *may* include in their *voluntary* interconnection agreements,"[16] but offered no support for its proposition that states are therefore permitted to *arbitrate* the details of interstate matters. It is demonstrably untrue that "the explicit language of Sections 252(b)(1) and (2) allows states to mediate or arbitrate the negotiations which concern ISP-bound traffic."[17] Contrary to CTSI's assertion, these sections contain no

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state constitution and laws, a state commission making intrastate rate decisions in the future will be acting with a new type layer of authority, authority delegated to it from the [FCC]." *Id.*

[15] *See, e.g.*, KMC Telecom Comments at 6 (it is "natural, and reasonable" to extend the reciprocal compensation process to encompass interstate ISP-bound calls); Global NAPS Comments at 11 ("state commissions have the legal responsibility pursuant to Section 251(b)(5) to establish reciprocal compensation arrangements for [ISP-bound traffic]"); *see also* Intermedia Comments at 2; Time Warner Comments at 15.

[16] CTSI Comments at 9 (emphasis added); *see also* parallel language in Focal Communications Corporation ("Focal") Comments at 17.

[17] CTSI Inc. Comments at 9-10; *see also* parallel language in Focal Comments at 17-18.

such "explicit language." Rather, as GTE explained in its Comments, they expressly limit state arbitrators to issues arising from requests for interconnection pursuant to Section 251(b), which the FCC just held does not apply to interstate ISP-bound traffic.[18]

Some commenters sought to avoid the difficult jurisdictional issue by proposing that states simply implement "federal rules," including federal proxy rates.[19] Yet, inter-carrier compensation for interstate traffic is simply not one of the interconnection obligations established by the Act.[20] States, therefore, lack authority to implement federal rules in this area. Moreover, state implementation of federal rules would still constitute a impermissible delegation to the states, as the Commission would necessarily divest its authority: state commission decisions with respect to interconnection agreements are not subject to Commission oversight, but are reviewable only by federal district courts.[21]

Several commenters sought to justify state authority by once again arguing that treating ISP-bound traffic as interstate is "flatly inconsistent with the ESP access charge exemption."[22] This is not so. As GTE demonstrated in its Comments,[23] the

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18 *See* GTE Comments at 12-14.

19 *See* AT&T Comments at 5-7; KMC Telecom Comments at 4-6; Prism Communications Services Comments at 5-6; RCN Telecom Comments at 8-9.

20 *See* GTE Comments at 12-13.

21 *See* 47 U.S.C. § 252(e)(6); *see also* Frontier Communications Comments at 7. Frontier also argues that the Commission's proposal may even run afoul of Supreme Court precedent prohibiting the conscription of state officers to administer and enforce federal programs. *See id.* at 8-9, citing *Printz v. United States*, 521 U.S. 898 (1997).

22 AT&T Comments at 19-20.

23 *See* GTE Comments at 15-16.

Commission's decisions creating and renewing the ESP exemption of necessity indicate that ESP traffic is jurisdictionally interstate and thus subject to interstate access charges but for the exemption. If such traffic were local, there would have been no need for an exemption.

Other commenters suggest that the FCC's rule subjecting some interstate CMRS calls to reciprocal compensation supports state jurisdiction over interstate ISP-bound traffic.[24] This argument also lacks merit. The statute only requires payment of reciprocal compensation for local calls, including local CMRS calls.[25] It is true that, as a result of the Commission's conclusion that all CMRS calls within a given MTA are local, *some* CMRS calls that may cross state lines are nonetheless subject to reciprocal compensation. This regulatory policy was adopted solely to accommodate the practical problem of determining the beginning and end points of a wireless call, not because the FCC delegated interstate authority to the states. In this proceeding, the proper boundaries of local markets are not at issue, rather, the Commission must determine how to regulate traffic that has been found to be clearly interstate.[26] Thus, the CMRS

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[24] *See* Cablevision Comments at 11-12; Commercial Internet Exchange Association Comments at 3; Global NAPS Comments at 10.

[25] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16013-14 (¶¶ 1034-1036) (1996) ("*Local Competition Order*").

[26] More fundamentally, there is another key difference between the Commission's treatment of CMRS traffic and ISP-bound traffic: unlike the CMRS context, where the Commission explicitly found that local CMRS traffic is covered by Section 251(b)(5), the Commission has determined that ISP-bound traffic is *not* covered by this statutory provision. *See Local Competition Order* at 15997 (¶ 1008); *see also Notice and NPRM* at ¶ 26 n.87.

example offers no support for the proposition that the FCC may single out an interstate service and subject it to reciprocal compensation requirements.

In light of the paucity of legal support to support their position on this jurisdictional matter, some commenters improperly seek to revisit the foundational holding of the Commission's Declaratory Ruling: that ISP-bound traffic evaluated in an end-to-end basis is substantially interstate.[27] Yet, the Commission's determination that "ISP-bound traffic is non-local interstate traffic" is final and binding.[28] This is not a matter open for comment in this rulemaking proceeding. Moreover, the Commission's underlying jurisdictional analysis adopted in the Declaratory Ruling was valid and based on solid and long-standing precedent recently reaffirmed in the GTE ADSL Order.[29]

Finally, both Focal and CTSI suggest that "the jurisdictional nature of ISP-traffic should be irrelevant to intercarrier compensation for this traffic."[30] Quite the opposite, under the existing regulatory approach, the jurisdictional nature of traffic *defines* the method of inter-carrier compensation: interstate traffic is subject to federal law, local

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27 Comptel Comments at 2; *see also* CoreComm Comments at 3 n.5 ("telecommunications traffic to ISPs is local traffic because it terminates when it is delivered to the ISP"); Florida PSC Comments at 2-4 ("the FCC is clinging to a weathered end-to-end jurisdictional approach that is particularly ill-suited for the years ahead").

28 *See Ruling and NPRM* ¶ 26 n.87.

29 *See GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148,* CC Docket No. 98-79, Memorandum Opinion and Order (rel. Feb. 26, 1999).

30 *See* Focal Comments at 14-15; CTSI Comments at 5; *see also* GST Telecom Comments at 15 (ISP-bound traffic should be subject to reciprocal compensation mechanisms developed under Sections 251 and 252 because "the functionality being compensated – transport and termination of calls – is the same regardless of the jurisdiction").

traffic is subject to state regulatory authority and reciprocal compensation mechanisms.[31] The remarkably cavalier approach offered by these commenters should not be countenanced.

As evidenced by the preceding legal and logical gymnastics designed to shore up state authority over this traffic, the Commission simply does not have the authority to delegate this issue to the states. Mere assertions of administrative ease are not sufficient to overcome the fundamental lack of state authority over interstate matters.[32] What is more, the Communications Act itself supports the core ideal that all interstate services should be treated in a like manner, rather than arbitrarily picking one interstate service and handing it over to the states to regulate.

III. SOME COMMENTERS OFFERED ADDITIONAL UNSOUND REASONS WHY ISP-BOUND TRAFFIC SHOULD BE TREATED LIKE LOCAL TRAFFIC

A. Neither Section 202(a) Nor a "Functional Equivalence" Analysis Requires Like Treatment of Local and ISP-Bound Traffic

ALTS and Time Warner Telecom argue that Section 202(a) requires the Commission to treat ISP-bound traffic like local traffic.[33] A number of other parties, without invoking Section 202(a), also suggest that ISP-bound traffic and local traffic are

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[31] In the long run, it may be that jurisdiction becomes "irrelevant" and similar regulatory treatment is given to all traffic – whether interstate or local. Indeed, to the extent that all traffic uses essentially the same network functions, it is only logical that a common approach could conceivably apply to all traffic. However, the law currently separates local and interstate traffic into separate regulatory frameworks. 47 U.S.C. §§ 152(b) and 201.

[32] *See* Association for Local Telecommunications Services ("ALTS") Comments at 5-8; Cablevision Comments at 10.

[33] *See* ALTS Comments at 12-13; Time Warner Comments at 1.

"functionally equivalent" and are "like" services.[34] A charge that a carrier has discriminated in violation of Section 202(a) entails a three-step inquiry: (1) whether the services are "like"; (2) if they are "like," whether there is a price difference; and (3) if there is a difference, whether it is reasonable.[35] Based on this rubric, these commenters argue that local traffic and ISP-bound interstate service are "like" services and must be governed by the same inter-carrier compensation mechanism. As set forth below, ISP-bound traffic is an interstate service and is not "like" or "functionally equivalent" to local voice traffic under any conceivable definition of these terms. If anything, a "functional equivalence" analysis indicates that ISP-bound traffic and other interstate traffic must be treated similarly.

As an initial matter, it is doubtful that Section 202(a) even applies to services assigned to different jurisdictions – and the commenters offer no indication that the Commission or the courts have ever held otherwise. In light of telecommunications' inherently dual jurisdictional system, it is nonsensical to suggest that a local service is "like" an interstate service, or that the Act prevents distinctions between local and interstate services. While *some day* an approach may be adopted under which all functionally-equivalent traffic is treated the same, today's legal framework mandates that interstate communications remain squarely within the Commission's control.

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[34] *See, e.g.,* CTSI Comments at 6 (ISP-bound calls should be treated as though they were local because they "have the same technical call-completion characteristics as any other local call"); RCN Comments at 3; GST Comments at 15.

[35] *See MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir., 1988). If the services are "like," the carrier offering them has the burden of justifying any price disparity as reasonable. *See, e.g., American Broadcasting Co. v. FCC*, 213

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Regardless of whether it is proper to do so, even if Section 202(a) or a functional equivalence analysis is applied in this instance, it is clear that ISP-bound traffic is *not* "like" local traffic. As the FCC and the courts have established, "likeness" within the meaning of Section 202(a) turns upon the "functional equivalency" test, which "focuses on whether the services in question are different in any material functional respect."[36] The "linchpin"[37] of this test is whether "customers perceive [the services] as performing the same functions."[38] From the end user's perspective, ISP-bound calls are quite unlike local calls: it is inconceivable that a voice call to a neighbor down the street and an Internet session during which the end user communicates with web sites across the country would be considered "functionally equivalent" from the customer's standpoint.

Furthermore, as GTE explained in its Comments, ISP-bound calls also possess other substantially different characteristics from local calls. Unlike regular local traffic, ISP-bound calls are one-directional (*i.e.,* ISPs do not originate calls for delivery to end users) and involve substantially longer hold times than regular local calls.[39] In the

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U.S. App. D.C. 369, 663 F.2d 133, 139 (1980) ("ABC").

[36] *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) (internal quotations omitted); *see also AT&T Communications, Revisions to Tariff FCC No. 12*, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4935-36 (1989).

[37] *Ad Hoc Telecommunications Users Comm. v. FCC,* 680 F.2d 790, 796 (D.C. Cir. 1982).

[38] *See MCI Telecommunications Corp. v. FCC*, 917 F.2d at 39; *see also American Broadcasting Co. v. FCC*, 663 F.2d 133, 139 (D.C. Cir. 1980); *accord Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d at 795-97.

[39] *See* GTE Comments at 7; *see also* Ameritech Comments at 10 (average Internet call is 26 minutes, average voice call is approximately 3.5 minutes); Cincinnati Bell Comments at 2 n.2.

context of a reciprocal compensation mechanism based on per-minute payments by ILECs to CLECs, these factors substantially skew payments and can substantially over-compensate CLECs, thereby creating serious inequities and uneconomic consequences.

Rather than properly focus on these fundamental differences and the end user's perspective, Time Warner, along with several other commenters, puts a novel spin on the "functional equivalence" test. It suggests that ISP-bound calls are like local calls because "*LECs perform the same functions* when exchanging local traffic as when they exchange ISP traffic over circuit-switched, dial-up connections."[40] Time Warner offers no support whatsoever in Commission or judicial precedent for re-formulating the test in this novel manner. Moreover, this interpretation of "functional equivalence" is nonsensical. *IXC-bound traffic* uses many of the same basic network functions as ISP-bound traffic, but this surely does not mean that long distance calls are "functionally equivalent" to local service and thus subject to reciprocal compensation.

The remaining two prongs of the Section 202(a) analysis are similarly inapposite. While the second prong prohibits disparate "pricing" and treatment of *end users*, it does not appear to have any relevance with respect to the terms of inter-carrier compensation. Finally, GTE submits that any "disparity" in inter-carrier compensation for interstate ISP-bound traffic and local voice traffic would be reasonable and justified. Interstate and local traffic involve different revenue streams, which logically should be

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[40] Time Warner Comments at 3 (emphasis added, internal quotations omitted); *see also* CTSI Comments at 6; RCN Comments at 3; GST Telecom Comments at 15.

reflected in the inter-carrier compensation mechanisms applied to each type of service. Indeed, a true "disparity" would exist if ISP-bound traffic were singled out and treated differently from other interstate traffic.

For similar reasons, Cox Enterprises completely misses the mark when it suggests that failure to subject ISP-bound traffic to reciprocal compensation would constitute "pric[e] discrimination on the basis of" customer premises equipment ("CPE").[41] Cox Enterprise's conclusion rests on a flawed premise: that "the only thing that distinguishes calls to ISPs from . . . [local] calls is the [CPE] at the receiving end of the calls."[42] As noted above, there are numerous factors that distinguish ISP-bound calls from local calls – foremost being that local traffic patterns are intrastate and ISP-bound traffic patterns are predominantly interstate.

B. Local Reciprocal Compensation Requirements Should Not be Extended to ISP-Bound Traffic Based on Costs

Several commenters suggest that ISP-bound traffic should be subject to local reciprocal compensation mechanisms because the two types of traffic involve the same costs.[43] Even if it were true (and it is not) that a CLEC faces the same costs in delivering traffic to ISPs and to local end users, this does not mean that the two types of service should be subject to the same inter-carrier compensation mechanism. To look only at the costs incurred by CLECs is to see only one side of the story. Indeed, ILECs

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41 Cox Comments at 7.

42 *Id.*

43 *See* Focal Comments at 15; Cox Comments at 7; CTSI Comments at 5.

simply have no corresponding interstate revenue source from which to make reciprocal compensation payments. GTE agrees with NTCA that "only when each carrier's cost and revenues associated with providing access to the Internet is properly determined, can there be any meaningful analysis of whether any inter-carrier agreements are appropriate to ensure that each carrier recovers its costs of providing connections to the Internet."[44] This is why, as GTE set forth in its Comments, the question of how ILECs and CLECs should compensate one another for the interchange of ISP-bound traffic should be dealt with *after* the more fundamental issues of network access (including how ISPs or end users will pay for network access) have been addressed.[45]

In any case, there is increasing evidence that the delivery of traffic to ISPs does not involve the same costs as delivery of traffic to local end users. GTE noted in its Comments that recent technological developments have made it possible for some CLECs to avoid circuit-switching on ISP-bound traffic.[46] These technological developments make it substantially cheaper for a CLEC to deliver ISP-bound calls, as opposed to local calls.[47] Thus, compensating CLECs based on an ILEC's costs further inflates the "regulatory revenue" these CLECs enjoy, exacerbating the arbitrage opportunities and further skewing investment and market entry decisions.

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44 NTCA Comments at 6.

45 *See* GTE Comments at 21-23.

46 *See* GTE Comments at 7. Indeed, to the extent any comparison is appropriate, the costs associated with delivery of ISP-bound traffic more closely resembles IXC-bound traffic (which, like traffic bound for an ISP, may be combined onto a single trunk) than local traffic (which must be switched and dispersed to individual end users).

47 *See id.*

C. Carriers' Administrative Concerns Do Not Merit Treating ISP-Bound Traffic As Local

Contrary to speculation by several commenters,[48] an ISP-bound compensation scheme that requires differentiating between ISP-bound calls and local calls would not be impossible to create nor excessively burdensome to implement. In fact, there are a number of workable methods available today for measuring or estimating ISP-bound calls as compared to local calls, and the Commission may also task industry fora to develop standards and alternative solutions in this area.

First, certain systems allow for the direct measurement of ISP-bound calls, such as the SS7 link monitoring system described in GTE's Comments that can capture call duration data for specific telephone numbers.[49] Alternatively, inexpensive techniques are available for estimating ISP-bound calls, based on extrapolations from observed traffic patterns on studied trunk groups.[50] LECs could develop other surrogates or simplifying assumptions to estimate ISP-bound traffic, just as they do to measure interstate traffic. For example, for switched access, IXCs provide factors to split

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[48] *See* AT&T Comments at 10 (suggesting that "any compensation scheme that required carriers separately to identify, measure and bill for ISP-bound traffic would be unjustifiably costly and time-consuming"); Comptel Comments at 5, 9; Cox Comments at 8-9; Global NAPs Comments at 9-10.

[49] GTE Comments at 9.

[50] LECs generally have the ability to conduct routine traffic studies that measure usage and calls/messages on specific trunk groups. From these studies, carriers can determine average call durations for originating and terminating traffic riding the trunk group(s). Using this information, and using assumed holding times for ISP calls and for local calls, it is a simple matter of mathematics to calculate the estimated amount of ISP-bound minutes on a particular trunk group.

interstate and intrastate usage when sufficient information is not available to explicitly determine the jurisdiction from the calling and called telephone numbers. Similarly, Feature Group A arrangements are still billed on the basis of assumed minutes of use. And, for local interconnection services, a "percent local use" ("PLU") factor is provided by each interconnecting party that splits local from intraLATA toll usage on combined trunk groups. These techniques could easily be adapted to estimate ISP-bound traffic, in lieu of actual measurement techniques.[51]

The Commission also could direct industry fora to develop standardized methods for measuring or estimating traffic levels. This would not be the first time the industry has done so. Indeed, when it adopted an inter-carrier compensation mechanism for interstate traffic in the 1980s, the Commission directed the industry (through designated fora) to develop necessary standards and practices for measuring interstate traffic.[52] Moreover, the industry has reacted time and again to new regulatory requirements, developing new measurement and estimation techniques to adapt to these new approaches. The industry certainly could do so again in this context.

The bottom line is that there exist a number of options for determining the respective levels of ISP-bound and local traffic today. Given a clear direction by the

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[51] Indeed, AT&T has previously acknowledged that LECs should be able to use "reasonable estimation techniques" to measure another kind of interstate traffic (CCL access minutes). *See AT&T Corporation, MCI Telecommunications Corporation v. Bell Atlantic - Pennsylvania*, Memorandum Opinion and Order, File Nos. E-95-006 *et al.*, FCC 98-321 at ¶ 92 n.224 (Dec. 9, 1998).

[52] While this process took a considerable amount of time and resources, much of the energy was devoted to establishing basic inter-carrier communications processes and operating parameters, which would not need to be replicated in this context.

Commission, carriers and/or industry fora could certainly once again develop workable methods of measuring and estimating traffic patterns. Most certainly, the additional costs associated with devising industry standard measurement and estimation capabilities would not be so burdensome as to justify the unlawful approach of treating ISP-bound traffic as though it were local.

D. The Commission Should Not Divide ISP-Bound Traffic Into "Interstate" and "Intrastate" Elements

The Commission should reject the efforts of some commenters to divide ISP-bound calls, or Internet traffic for that matter, into interstate and intrastate components. As GTE and many others have noted, it is well-established that such segregation would be impossible as a practical matter.[53] As ITAA explains, "[n]either the subscriber, nor the ISP, nor the serving LEC typically has any way of knowing the geographic location of the computer servers being accessed during an on-line session."[54] Internet sessions often hop from one jurisdiction to another, and may even involve interstate and intrastate contacts simultaneously because of the multitasking capabilities of most modern computer operating systems. No commenter offered up a viable method for measuring interstate and intrastate uses of the Internet; accordingly, the Commission should establish a single inter-carrier compensation approach for all Internet-bound traffic.[55]

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[53] *See* Information Technology Association of America ("ITAA") Comments at 3-5; Wisconsin State Telecommunications Association at 1.

[54] ITAA Comments at 5.

[55] RNK Telecom argues that it may be possible to approximate the proportion of interstate versus intrastate Internet usage – but neither of its proposals would produce

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In light of the technological impossibility of separating out local and interstate ISP-bound traffic, some commenters are reduced to arguing that under an "end-to-end" jurisdictional analysis – contrary to the Commission's holding – ISP-bound traffic is actually predominantly intrastate in nature.[56] For example, Focal suggests that "a far greater percentage of ISP-bound traffic is jurisdictionally intrastate, and even local, due to 'caching' and 'mirroring' of Internet sites."[57] The Commission has already examined these arguments, however, and has reached the opposite conclusion. In the Declaratory Ruling, the Commission determined that, *notwithstanding* the impact of practices such as "caching" and "mirroring," "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[58] In the end, the predominantly interstate nature of ISP-bound traffic and the technological inability of carriers to subdivide this traffic necessitate interstate federal regulation for ISP-bound traffic.

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anything other than a wild guess. For example, RNK Telecom suggests that the Commission may "determin[e] the ratio between incoming trunks to the ISP and direct trunks to the Internet from the ISP." RNK Telecom Comments at 5. This would be like comparing apples and oranges: RNK Telecom does not even suggest how to compare the volume of "incoming" circuit-switched traffic on a T1 line to the volume of "outgoing" packets of data bound for the Internet.

[56] *See* Focal Comments at 16-17; CTSI Comments at 6-7; Global NAPS Comments at 9, n.19. A similar argument was advanced by Hyperion Communications, in an attempt to persuade the Commission that GTE's "DSL Solutions" service would involve negligible interstate traffic and thus constitute an intrastate service. GTE thoroughly refuted Hyperion's speculative and poorly-supported theory in a submission made in that proceeding, a copy of which is attached as Attachment A, and will not elaborate on the interstate nature of the Internet again here. *See* Attachment A, GTE Motion to Strike, *GTE Telephone Operating Companies, GTOC FCC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79 (filed Feb. 18, 1999).

[57] Focal Comments at 16.

IV. GTE URGES THE COMMISSION TO MAKE ONLY A LIMITED CLARIFICATION REGARDING SECTION 252(i)

A. The Commission Should Clarify That Carriers May "Opt Into" Existing Agreements Only for a Term Co-extensive With the Original Agreement—Which Would Not Include Any Month-to-Month Extensions During Renegotiations

In the NPRM, the Commission invited comment on a state arbitrator's ruling which allowed a carrier to opt into an interconnection agreement under Section 252(i) for a full, new contract term, rather than a term coterminus with the original agreement. Parties filing comments, including GTE, overwhelmingly urged the Commission to clarify that Section 252(i) does not support such an interpretation, and that parties opting into agreements under this section are bound by the term of the original agreement.[59] As Focal Communications concluded, "[t]his approach would best balance the interests of incumbent LECs and the rights of competitive LECs to opt-in to existing agreements under Section 252(i)."[60]

The few parties who support the state arbitrator's interpretation fail to demonstrate that this approach is permissible under Section 252(i), or is sound as a

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58 *Ruling and NPRM* ¶ 18.

59 *See e.g.*, Florida PSC Comments at 8 (expressing the view that the "ability of a CLEC to use conditions or rates from a pre-existing contract should expire at the same time the original contract terminates"); Texas Public Service Commission Comments at 8-9 (asserting that provisions adopted under 252(i) "expire upon the expiration date of the original contract"); Focal Comments at 19 (asserting that the Commission "should permit opting-in to existing agreements for the balance of the term of such agreements"); *see also* CTSI Comments at 17; GST Telecom Comments at 23; NTCA Comments at 18-19; Competitive Telecommunications Association ("Comptel") Comments at 16; and SBC Comments at 32-33.

60 Focal Comments at 19.

matter of policy.[61] Section 252(i) mandates only that the *same* terms and conditions as contained in approved agreements be made available to a requesting carrier. As GTE explained, a request for a different expiration date is, by definition, a *different* term. AirTouch offers the novel suggestion that Section 252(i) entitles a requesting carrier to the same "overall economic benefit" as received by a party to the original agreement – and, therefore, it must receive the same length of contract term. However, this interpretation finds no support in the language of Section 252(i).[62]

Commenters that advocate the right to "opt into" agreements with refreshed contract terms also fail to acknowledge the deleterious impact of such a right on negotiations. As the National Telephone Cooperative Association (NTCA) notes, allowing parties a refreshed term, and permitting subsequent carriers to extend the life of an agreement in perpetuity, would derail the entire system of voluntary negotiations. Indeed such a ruling would cause voluntary negotiations to come to a halt because, as NTCA explains, "[n]o incumbent would ever have an opportunity to adapt to unforeseen or changed circumstances . . . [making] negotiations impossibly more difficult."[63]

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61 *See e.g.,* AirTouch Comments at 4-6 (advocating either retroactive applicability or a prospective term equal to the term provided by the original agreement); AT&T Comments at 22; MCI WorldCom Comments at 22.

62 GTE agrees with AirTouch that a Section 252(i) request cannot be used to adopt an agreement or provision that is itself a product of a prior 252(i) request. *See* Airtouch Comments at 5-6. As AirTouch explains, Section 252(i) requests applies only to arbitrated or negotiated agreements, not to agreements entered into under Section 252(i). *Id.* Nonetheless, as discussed above, AirTouch's proposal that requesting carriers should be permitted to opt into an agreement for an additional period of time that equals the original term is not supported by the plain language of 252(i).

63 NTCA Comments at 19; *see also* GTE Comments at 25.

The Commission should also clarify that an ILEC is not required to make available services or elements contained in agreements that are so close to expiring that they have entered into the designated renegotiation period.[64] There is no sound economic reason to allow a carrier to opt into agreements that are almost expired. Such short-lived arrangements would be an unreasonable burden on ILECs due to the high start-up costs associated with new service relationships. A more balanced approach would be to preclude the adoption of agreements once a designated renegotiation period has begun.[65]

Finally, the Commission should clarify that a carrier cannot "opt into" an expired agreement. Only one commenter explicitly suggested that carriers should be permitted to opt into an expired agreement for a period of years after its termination date.[66] As GTE explained in its comments, however, this suggestion is contrary to the plain language of Section 252(i) – an ILEC is required to make available only those agreements "to which it *is* a party," not those to which it *was* a party.[67] MCI WorldCom also appears to attempt to resuscitate expired agreements under Section 252(i) in order to obtain services and elements provided under a so-called "evergreen clause."[68] Such

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64 *See* GTE Comments at 26.

65 As explained in GTE's opening comments, interconnection agreements typically include provisions which contemplate that negotiations for a replacement agreement will begin within a specified period (e.g., 90 days) prior to the termination of the original agreement. GTE Comments at 26 n.54.

66 *See* Telecommunications Resellers Association Comments at 12.

67 *See* GTE Comments at 26 n.55; *see also* 47 U.S.C. § 252(i) (emphasis added); 47 C.F.R. § 51.809(a).

68 MCI Worldcom Comments at 22.

clauses are included in agreements to allow service to continue after the original agreement has expired, for a limited period only, while the parties negotiate a new agreement. As GTE explained in its Comments, it makes little sense to allow parties to opt into expired agreements or an agreement that is about to expire.[69] Rather than allow parties to opt into an agreement for a matter of weeks or days, and go directly into renegotiations, the better approach would be for parties simply to enter a new full-term agreement.[70]

B. The Commission Should Not Expand The Scope Of This Proceeding To Address Other Broader Issues Relating to Section 252(i)

The Commission should not address the laundry list of additional issues relating to Section 252(i) raised by a few parties.[71] Indeed some commenters have even asserted that this proceeding is inappropriate to resolve that issue.[72] In light of the specific nature of the Notice and the centrality of the reciprocal compensation issue, it would be unwise to expand the scope of this proceeding as requested by these parties.

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[69] *See* GTE Comments at 26.

[70] If the evergreen period turns out to be lengthy, there is clearly no justification for providing another carrier with this extension. Because 252(i) requires opt ins only under the same terms and conditions as an approved agreement, such "terms" cannot include additional periods potentially controlled by only one of the original parties, not the terms of the agreement.

[71] Indeed, AirTouch, the only commenter to raise a plethora of broader Section 252(i) issues, acknowledged that the *Ruling and NPRM* raised only one issue with respect to 252(i). AirTouch Comments at 7.

[72] *See e.g.,* Personal Communications Industry Association Comments at 7-8; MCI WorldCom Comments at 20; Florida PSC Comments at 7.

V. CONCLUSION

Based on the foregoing, the Commission's tentative plan to allow states to determine whether compensation should be paid for ISP-bound traffic is unlawful and, moreover, would perpetuate serious inequities that exist in the market today. Instead, GTE respectfully requests that the Commission establish an eighteen month moratorium on inter-carrier compensation for ISP-bound calls, while keeping the ESP exemption in place, and promptly work to develop a long term compensation mechanism that treats ISP-bound traffic like its interstate brethren. GTE also urges the Commission to clarify that parties opting onto an agreement under Section 252(i)

are bound by the term of the original agreement. GTE believes these policies will most effectively promote full and fair competition in the marketplace.

Respectfully submitted,

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